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In the Supreme Court of the United States

OCTOBER TERM, 1974

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION, PETITIONER

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (A. 63–71)[2] is reported at 486 F. 2d 863. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (A. 34–54) are reported at 197 NLRB No. 127. The Board's earlier decision

[1] The other parties to the case are the National Labor Relations Board and Communications Workers of America, AFL-CIO.

[2] "A." refers to the separate appendix printed by the Company. "S.A." refers to the supplemental appendix printed by the Board.

and determination of dispute (A. 9–24) are reported at 191 NLRB 828.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1973 (A. 72). Timely petitions for rehearing *en banc* filed by the Board, the Company, and the Communications Workers of America, AFL–CIO were denied on November 26, 1973 (A. 2, 73). The petition for a writ of certiorari was filed on February 25, 1974, and granted on May 13, 1974 (A. 80). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), the Administrative Procedure Act (5 U.S.C. 551, *et seq.*), and the Board's Rules and Regulations (29 C.F.R. 102.1, *et seq.*) are set forth in the Appendix, *infra,* pp. 31–46.

QUESTIONS PRESENTED

1. Whether a proceeding to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act must be conducted in accordance with the provisions of the Administrative Procedure Act applicable to "adjudications."

2. Whether the prosecution of a Section 8(b)(4)(D) unfair labor practice case by the same Board agent who presided at a prior Section 10(k) hearing involving the jurisdictional dispute giving rise to the unfair labor practice case invalidated the Board proceedings.

STATEMENT

A. INTRODUCTION

Section 8(b)(4)(D) of the National Labor Relations Act makes it an unfair labor practice for a labor organization to exert strike pressure to compel an employer to assign particular work to one group of employees rather than to another group of employees. Unlike the statutory procedure governing other unfair labor practice charges—where an unfair labor practice complaint is promptly issued when there is reasonable cause to believe that the charge is true (Section 10(b), 29 U.S.C. 160(b))—the Act suspends the unfair labor practice proceeding on a meritorious Section 8(b)(4)(D) charge to permit a resolution of the jurisdictional dispute which gave rise to the charge. Section 10(k) of the Act empowers and directs the Board—

> to hear and determine the dispute out of which such unfair labor practice shall have arisen unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Under procedures which the Board formulated just after Sections 8(b)(4)(D) and 10(k) were enacted in 1947, the Board's regional director—if he finds that an

8(b)(4)(D) charge has merit and that no satisfactory evidence has been presented that the underlying dispute has been or will be voluntarily adjusted—serves on all parties to the dispute "a notice of hearing under section 10(k) of the act before a hearing officer at a time and placed fixed therein." The notice of hearing contains "a simple statement of the issues involved in such dispute." (29 C.F.R. 102.90, *infra*, pp. 34–35.) The hearing procedure conforms, insofar as applicable, to that utilized in determining representation questions under Section 9(c) of the Act, 29 U.S.C. 159(c). The hearing officer "normally is an attorney or field examiner attached to the regional office" (29 C.F.R. 101.20(c)). "The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board" (29 C.F.R. 101.34, *infra*, p. 39). "All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions"; they are also "permitted to argue orally on the record before the hearing officer" (*ibid.*). "At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute" (*ibid.*).

The parties may "file briefs with the Board and * * * request oral argument which the Board may or may not grant. * * * The Board then considers the

evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter." (29 C.F.R. 101.35, *infra*, pp. 39–40.) If the parties subsequently submit satisfactory evidence that they have complied with the determination, the regional director dismisses the 8(b)(4)(D) charge (29 C.F.R. 101.36, *infra*, p. 40). If the regional director "is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D) of the act, and the proceeding follows the procedure" utilized for any other unfair labor practice case (*ibid.*).[3]

The hearing in the 8(b)(4)(D) case is conducted in conformity with the procedures for cases of adjudication prescribed by the Administrative Procedure Act: "A duly designated administrative law judge presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. * * * Counsel for the general counsel, all parties to the proceeding, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record" (29 C.F.R. 101.10(a)). At the conclusion of the hearing, the administra-

[3] "However, if the Board determines that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with the determination" (29 C.F.R. 101.26, *infra*, p. 40).

tive law judge prepares a recommended decision, to which the parties may file exceptions with the Board (29 C.F.R. 101.11). If exceptions are filed, the Board reviews the entire record, and then "issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the administrative law judge" (29 C.F.R. 101.12).[4]

If the Board finds that the union charged in the complaint has violated Section 8(b)(4)(D) of the Act and issues a remedial order, that order can be reviewed in the appropriate court of appeals under Section 10(e) or (f) of the Act (29 U.S.C. 160(e) or (f), *infra*, pp. 32–33). "The record of the proceeding under section 10(k) and the determination of the Board thereon," which becomes a part of the record in the unfair labor practice proceeding, is subject to judicial review at the same time (29 C.F.R. 102.92, *infra*, p. 36).

B. THE BOARD PROCEEDINGS IN THE PRESENT CASE

1. THE WORK DISPUTE

On August 27, 1970, petitioner Company (ITT) executed a contract with the Village of Elk Grove, Illinois, to install, test, and maintain a private telephone system in the Elk Grove Village Firehouse and City Administration offices. Installation of the equipment involved two phases: "pulling cable," which

[4] "The Board does not consult with members of the [administrative law judge's staff of the division of judges] or with any agent of the general counsel in its deliberations" (29 C.F.R. 101.12).

entailed routing telephone cables from a central telephone room to the telephone instruments located throughout the building; and "terminating the cable," which involved installing a PBX telephone switch system, testing equipment, identifying and connecting telephone wires contained in cables, and installing the telephone instruments to these wires. ITT subcontracted the work of "pulling cable" to C. A. Riley Electric Construction Co. (Riley), whose employees were represented by Local 134, International Brotherhood of Electrical Workers, AFL–CIO ("Local 134"); "terminating the cable" work was assigned to ITT's employees, who were represented by the Communications Workers of America, AFL–CIO ("CWA"). (A. 12, 36.)

Shortly after the assignment of work, ITT officials, at the request of the president of Riley, met with the Local 134 business agent who indicated that, in the past, the Cook County Building Trades Council had threatened to stop Cook County projects if "non-union" men were used, and that "CWA was not recognized in Cook County and CWA would install no telephone equipment in Cook County" (A. 37). At a subsequent meeting with ITT officials, the business agent repeated the history of past Council action, and warned, " 'we better get that work or there will be trouble' " (A. 37–38).

On December 3, 1970, ITT employees reported to the jobsite to begin "terminating the cable." When they arrived, employees of Illinois Bell Telephone Co. and Johnson Electric Co., both represented by Local

134, were already at work. A Local 134 steward asked to see the union cards of the ITT employees. When shown a CWA card, the steward turned to the Johnson Electric employees and announced "we can't work here." These employees, together with the Local 134 steward, left their job stations and retired to have coffee outside the building. While the employees were having coffee, the Local 134 steward announced to them, "[am leaving because I do not care] to work with 'non-union' men." All Local 134 employees then left the jobsite. (A. 39–40.)

That afternoon the general contractor of the project contacted ITT officials and secured their agreement to remove ITT employees the following day. This information was conveyed to the Local 134 steward by his employer. The next day the steward and all other employees returned to work. (A. 40–41.) [5]

2. THE SECTION 10(k) PROCEEDING

On December 3, 1970, ITT filed unfair labor practice charges with the Board alleging that Local 134 had violated Section 8(b)(4)(D) of the Act by engaging in strike pressure to force ITT to assign work to members of Local 134 rather than to employees of ITT represented by CWA. (A. 41). The Board's regional director found reasonable cause to believe the charges had merit and, pursuant to Section 10(k) of the Act, issued a notice of hearing to determine the dispute out of which the alleged unfair labor practice

[5] Subsequently, after Johnson Electric and Illinois Bell had completed their work at the project, ITT's employees returned to the jobsite and completed the work of terminating the cable (A. 41).

arose (A. 4–5). On March 12, 15, and 17, 1971, a hearing was held before a hearing officer, an employee of the regional office. At the hearing, ITT and the competing unions appeared, and were given full opportunity to examine and cross-examine witnesses and to adduce evidence. Thereafter, they filed briefs in support of their positions, and the case was transmitted to the Board for decision. (A. 9.)

On June 30, 1971, the Board issued its Decision and Determination of Dispute (A. 9–24). After weighing all the pertinent factors in the light of the record evidence, the Board concluded that ITT's employees represented by CWA were entitled to perform the disputed work of terminating the cable (A. 21–23).[6] The Board directed Local 134 to notify the regional director within 10 days whether it would comply with the Board's determination of the dispute (A. 23–24). Local 134 moved the Board to reconsider its determination, but the Board denied the motion on the ground that it presented "nothing not previously considered" (A. 1).

3. THE UNFAIR LABOR PRACTICE PROCEEDING

On August 30, 1971, Local 134 notified the regional director that it would not comply with the Board's 10 (k) determination (A. 42). Consequently, the regional

[6] The Board relied, *inter alia*, on these factors: (1) ITT and CWA were parties to a contract covering the disputed work; (2) the particular skills and training required to install PBX systems were possessed by ITT's employees; (3) efficiency and economy of operations would result from use of ITT's employees; (4) industry and employer practices favored awarding the work to ITT's employees (A. 16–21).

director, on behalf of the Board's General Counsel, issued a complaint upon the 8(b)(4)(D) unfair labor practice charges which had been held in abeyance pending an effort to resolve the underlying dispute pursuant to Section 10(k) (A. 25–31).

A hearing on the unfair labor practice complaint was held before an Administrative Law Judge[7] on November 4, 1971 (A. 34–35). Counsel for the General Counsel was the same individual who served as hearing officer at the 10(k) hearing (A. 9, 34). At the hearing, all parties—the General Counsel, ITT, and the two unions—were afforded full opportunity to adduce evidence, to produce and cross-examine witnesses; and subsequently all filed briefs with the Administrative Law Judge (A. 35).

On February 7, 1972, the Administrative Law Judge issued his decision, finding that Local 134 had violated Section 8(b)(4)(D) of the Act by threatening ITT, and inducing employees of neutral employers to cease working, with the object of forcing ITT to assign the disputed work to employees represented by Local 134 rather than to ITT employees represented by CWA (A. 46–47). The Law Judge recommended that Local 134 be ordered to cease its unlawful conduct (A. 47–50).

Local 134 filed exceptions with the Board urging, *inter alia,* that the complaint be dismissed because the participation of the same individual as hearing officer in the 10(k) proceeding and counsel for the General

[7] The title of "Trial Examiner" was changed to "Administrative Law Judge," as of August 19, 1972 (37 Fed. Reg. 16787).

Counsel in the unfair labor practice proceeding violated the Administrative Procedure Act prohibition (n. 8, *infra*) against combining prosecutorial and judicial functions. The Board, with modifications not relevant here, affirmed the decision of the Administrative Law Judge and adopted his recommended order (A. 51–55).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals found that the Board's decision was "supported by the controlling facts of the case" (A. 68). It concluded, however, that Section 554 of the Administrative Procedure Act (5 U.S.C. 554) was applicable to Section 10(k) proceedings, and that the dual roles played by the hearing officer violated "the spirit and the letter of the Act"[8] and were "incompatible with the accepted norms for the proper administration of justice" (A. 71). The court held that "[a]n order of the Board thus tainted should not be enforced" (*ibid.*).

SUMMARY OF ARGUMENT

I

The holding of the court below that the ban on combining the functions of prosecutor and judge, imposed by Section 554 of the Administrative Procedure

[8] Section 554(d) in relevant part, provides that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * * except as witness or counsel in public proceedings. * * *"

Act, is applicable to a Board proceeding to determine a jurisdictional dispute under Section 10(k) of the National Labor Relations Act is erroneous. Section 554(a) applies only in a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." A Section 10(k) proceeding is not an "adjudication," as that term is defined by the Administrative Procedure Act (Section 551(7) and (6)), for it does not lead to an "order" which is a "final disposition" by the Board of the matter for which its processes have been invoked. *Bricklayers Union* v. *National Labor Relations Board,* 475 F. 2d 1316, 1318–1321 (C.A.D.C.). As this Court recognized in *National Labor Relations Board* v. *Plasterers' Union No. 79,* 404 U.S. 116, 122, n. 10: "The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10(k) decision, the Board must prove the union guilty of a § 8(b)(4)(D) violation before a cease-and-desist order can issue."

A Section 10(k) determination is not subject to the provisions of the Administrative Procedure Act governing adjudications for the further reason that the National Labor Relations Act does not require that it be made "on the record" of the hearing. The fact that the Board, by regulation, has provided for "on the record" determinations does not alter this conclusion. For, "any agency is free under the [Administrative Procedure] Act to accord litigants appearing before it more procedural rights than the Act requires." *United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224, 236, n. 6.

Practical considerations confirm the reasonableness of the Board's long-standing view (see *Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341 that the Administrative Procedure Act provisions governing adjudications are not applicable to a Section 10(k) proceeding. If those provisions were applicable, the hearing could only be held before an Administrative Law Judge appointed under special procedures; he would have to prepare an initial decision, after affording the parties an opportunity to submit proposed findings and conclusions; and there could be no Board review until the parties had a further opportunity to file exceptions to that decision. These procedural requirements, which are appropriate for an adversary, trial-type proceeding, which turns largely on credibility determinations, serve no useful purpose in a Section 10(k) proceeding which is essentially investigatory and non-adversary, like a Board representation proceeding. On the other hand, to burden a Section 10(k) proceeding with these requirements would only impair Congress' objective of attaining "as expeditious a resolution of the jurisdictional dispute as is reasonably possible." *Bricklayers Union* v. *National Labor Relations Board, supra,* 475 F. 2d at 1321.

II

The view of the court below that the Board agent's dual role in the Section 10(k) and Section 8(b)(4)(D) proceedings was "incompatible with the accepted norms for the proper administration of justice" (A. 71) rests on a misconception of the hearing officer's

function in the 10(k) hearing and the relationship of that hearing to the subsequent unfair labor practice proceeding. The hearing officer's sole function at the 10(k) hearing is "to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination by the Board" (29 C.F.R. 101.34). "At the close of the hearing, the case is transferred to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to the resolution of the dispute" (*ibid.*). If a Section 8(b)(4)(D) unfair labor practice proceeding ultimately results and the same person who acted as hearing officer at the 10(k) stage is selected to prosecute the 8(b)(4)(D) complaint, there is little likelihood that he will be called upon to advocate a position based upon his evidentiary rulings at the 10(k) hearing. For the Board's 10(k) determination is not subject to relitigation in the 8(b)(4)(D) proceeding; the basic issue open to litigation is whether the union has in fact engaged in economic pressure for an object proscribed by Section 8(b)(4)(D)—an issue which was considered only preliminarily in the 10(k) proceeding.

ARGUMENT

I. A PROCEEDING TO DETERMINE A JURISDICTIONAL DISPUTE UNDER SECTION 10(k) OF THE NATIONAL LABOR RELATIONS ACT NEED NOT BE CONDUCTED IN ACCORDANCE WITH THE PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT APPLICABLE TO "ADJUDICATIONS"

Section 554 of the Administrative Procedure Act (hereafter "A.P.A."), together with Sections 556, and

557,[9] is, with six enumerated exceptions,[10] applicable "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." We shall show below that, contrary to the view of the court of appeals, Section 554 is not applicable to a Section 10(k) proceeding.[11]

A. A SECTION 10(k) DETERMINATION IS NOT AN "ADJUDICATION"

The A.P.A. defines "adjudication" as "agency process for the formulation of an order" (Section 551(7)), and "order" as "the whole or a part *of a final disposition* * * * of an agency in a matter other than rule making * * *" (Section 551(6); emphasis added).

[9] Section 556(a) which, *inter alia*, requires the appointment of a hearing examiner in conformity with 5 U.S.C. 3105 (see *infra*, p. 24), applies "to hearings required by section 553 [rule making] or 554 [adjudications] of this title to be conducted in accordance with this section." Section 557(a), which, *inter alia*, requires the hearing examiner to prepare an initial decision which is subject to review by the agency upon exceptions by the parties, applies "when a hearing is required to be conducted in accordance with section 556 of this title."

[10] One exception is "the certification of worker representatives."

[11] The court below stated (A. 70): "It is apparently admitted that § 554 applies to § 10(k) hearings." It added (*id.* at n. 3): "We assume that the § 10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of § 556, inasmuch as the statute so requires and no point was made of any distinction, either at the hearing or on appeal." However, the Board, ITT, and CWA all argued that the provisions of the Administrative Procedure Act respecting adjudications were inapplicable to a Section 10(k) proceeding. See Board's C.A. Br. 29–31, and n. 33. Indeed, the Board sent the court, prior to its decision, a copy of the opinion in *Bricklayers Union* v. *National Labor Relations Board*, 475 F. 2d 1316 (C.A.D.C.), discussed *infra*.

"Thus, investigatory proceedings, no matter how formal, which do not lead to the issuance of an order containing the element of final disposition as required by the definition, do not constitute adjudication." Attorney General's Manual on the Administrative Procedure Act 40 (1947). As the Court of Appeals for the District of Columbia Circuit correctly concluded, in finding the adjudication provisions of the A.P.A. inapplicable to a Section 10(k) proceeding, such a proceeding does not lead to an "order" which is a "final disposition" by the Board of the matter for which its processes have been invoked. *Bricklayers Union v. National Labor Relations Board, supra,* 475 F. 2d at 1318–1321.

The Board reached the same conclusion shortly after Section 10(k) was enacted. In rejecting a contention that Section 8 of the A.P.A. (now Section 557) was applicable to a 10(k) proceeding, it stated:

> Under Section 202.32 of the Board's Rules and Regulations—Series 5, as amended, the hearing under Section 10(k) is nonadversary in character, and according to the procedure adopted therefor, conducted in the same way as a hearing in a representational proceeding. The Board adopted such procedure because the decision in the proceedings under Section 10(k) is a preliminary administrative determination made for the purpose of attempting to resolve a dispute within the meaning of that section; the unfair labor practice itself is litigated at a subsequent hearing before a Trial Examiner in the event the dispute remains unresolved. It is to the subsequent adversary hearing, which leads to a final Board adjudication, that Section 8 of the Administrative Procedure Act applies. [*Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341.] [12]

Similarly, this Court observed in *National Labor Relations Board* v. *Plasterers' Union No. 79,* 404 U.S. 116, 122, n. 10:

> The § 10(k) determination is not binding as such even on the striking union. If that union continues to picket despite an adverse § 10(k) decision, the Board must prove the union guilty of a § 8(b)(4)(D) violation before a cease-and-desist order can issue. The findings and conclusions in a § 10(k) proceeding are not *res judicata* on the unfair labor practice issue in the later § 8(b)(4)(D) determination. *International Typographical Union,* 125 N.L.R.B. 759, 761 (1959). Both parties may put in new evidence at the § 8(b)(4)(D) stage, although often * * * the parties agree to stipulate the record of the § 10(k) hearing as a basis for the Board's determination of the unfair labor practice. Finally, to exercise its powers under § 10(k), the Board need only find that there is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred, while in the § 8(b)(4)(D) proceeding itself the Board must find by a preponderance of the evidence that the picketing union has violated § 8(b)(4)(D).* * *

To be sure, "the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board award determines who will

[12] See also *International Longshoremen's and Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626, 628–629.

prevail in the unfair labor practice proceeding" (*National Labor Relations Board* v. *Plasterers' Union No. 79, supra,* 404 U.S. at 126–127). But the function of the Section 10(k) decision is merely to set in motion the machinery for determining whether a complaint under Section 8(b)(4)(D) should issue:

> If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed. Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision, but both will lose their § 8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job. The employer will be under intense pressure, practically, to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision. [*Id.* at 127; footnote omitted.]

That a Section 10(k) determination is not final agency action which culminates in an order is confirmed by the court holdings that such a determination is not directly reviewable in the court of appeals under Section 10(e) or (f) of the Act, 29 U.S.C. 160(e) or (f);[13] it is reviewable only on review of a

[13] That section provides for review only of "a final order of the Board." That phrase "'refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found—in either case an order entered as the culmination of the [unfair labor practice] procedure described in Section 10(b) and (c) of the Act [29 U.S.C. 160(b) and (c)].'" *Laundry Workers* v. *National Labor Relations Board,* 197 F. 2d 701, 703 (C.A. 5). See also *American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401, 405–408.

Section 8(b)(4)(D) order. *Shell Chemical Co.* v. *National Labor Relations Board,* 86 LRRM 2708, 2710–2713 (C.A. 5); *Manhattan Construction Co.* v. *National Labor Relations Board,* 198 F. 2d 320 (C.A. 10); *Trane Co.* v. *National Labor Relations Board,* 68 LRRM 3024 (C.A. 6); *Rafel & Co.* v. *Local No. 9, International Brotherhood of Electrical Workers,* 47 LRRM 2897 (C.A. 7), certiorari denied, 366 U.S. 948; *Henderson* v. *International Longshoremen's Union Local 50,* 457 F. 2d 572, 574, 577–578 (C.A. 9), certiorari denied, 409 U.S. 852; *contra: Waterway Terminals Co.* v. *National Labor Relations Board,* 467 F. 2d 1011 (C.A. 9). Cf. *National Labor Relations Board* v. *Local 991, International Longshoremen's Association,* 332 F. 2d 66, 69–71 (C.A. 5). As the Fifth Circuit stated in *Shell Chemical, supra,* 86 LRRM at 2712–2713:

> In this regard, the non-reviewable nature of a section 10(k) proceeding is like the representational certification procedure of section 9. A Board certification of a union as an employee bargaining representative is only reviewable if the employer refuses to bargain and an order under section 8(a)(5) issues from an unfair labor practice proceeding. The certification itself is not reviewable. *American Federation of Labor* v. *NLRB, supra,* 308 U.S. at 408–412.

Finally, there is a strong "similarity between the nature of a Section 9 representation proceeding"—which is admittedly exempt from Section 554 and the other provisions of the A.P.A. governing adjudications—"and a proceeding under section 10(k)." *Bricklayers Union* v. *National Labor Relations Board, supra,* 475 F. 2d at 1319.[14] Indeed, "the Board adopted the same practice in section 10(k) hearings [see *supra,* pp. 16–17] shortly after that section followed section 9 into the Act, subsequent to the enactment of the A.P.A."[15] *Id.* at 1319–1320. Thus, both proceedings are essentially investigatory and non-adversary.[16] The evidentiary material, in both, relates primarily to economic facts such as the nature of the employer's business, the duties of certain employees, and the history of collective bargaining. And, in both, issues of credibility are rarely

[14] While Section 554 of the A.P.A. specifically excludes a "certification of worker representatives" (n. 10, *supra*), this exclusion was not necessary since the non-final, investigative nature of a representation proceeding would, in any event, have removed it from the category of an adjudication. "[T]his exclusion may have been due simply to recognition that such certification, which 'rests so largely upon an election or the availability of an election,' had previously been held by the Supreme Court not to be adjudicatory like a final order of the Board in an unfair labor practice proceeding. *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 408–412 * * * (1940)." *Bricklayers Union* v. *National Labor Relations Board, supra,* 475 F. 2d at 1319 (footnotes omitted).

[15] Section 10(k) was added to the National Labor Relations Act in June 1947, approximately one year after the A.P.A. was enacted.

[16] This Court, in *Plasterers' Union, supra,* described the 10(k) hearing as "a comparative proceeding aimed at determining which union is entitled to perform certain tasks" (404 U.S. at 135).

presented.[17] The legislative history of the A.P.A. indicates that the procedures governing adjudications were not directed at proceedings of this type, but rather at those, like an unfair labor practice proceeding, which are accusatory or prosecutory in nature.[18]

B. A SECTION 10(k) DETERMINATION IS NOT REQUIRED BY STATUTE TO BE MADE "ON THE RECORD AFTER OPPORTUNITY FOR AN AGENCY HEARING"

An "adjudication" is subject to Section 554 and related provisions of the A.P.A. only if some other statute[19] requires that it be made "on the record

[17] See Attorney General's Committee on Administrative Procedure in Government Agencies, Monograph No. 5, S. Doc. No. 10, 77th Cong., 1st Sess., Pt. 5, 35, n. 144; *Utica Mutual Insurance Co.* v. *Vincent*, 375 F. 2d 129, 134 (C.A. 2), certiorari denied, 389 U.S. 839; 93 Cong. Rec. 6452–6453, 6506, 2 Legislative History of the Labor Management Relations Act, 1947 (G.P.O. 1948) (hereafter "Leg. Hist., 1947"), 1554, 1585 (remarks of Senators Morse and Murray criticizing deletion of the provision which would have permitted the Board to appoint an arbitrator to decide jurisdictional disputes).

[18] Carl McFarland, a member of the Attorney General's Committee which initially drafted and proposed legislation leading to the A.P.A., testified:

"Now, to repeat, there are two kinds of administrative operations, the legislative operation called rule making which we have discussed, and adjudication which is sometimes called an accusatory procedure. That is a procedure where an agency comes forward and points its finger to a given person or to a company and says, 'You have sinned and we will proceed to try you.'" (S. Doc. No. 248, 79th Cong., 2d Sess. 78.)

See also *id.* at 24, 79, 225, 353; Attorney General's Manual, *supra,* 14–15.

[19] Or the due process clause of the Constitution. See *Wong Yang Sung* v. *McGrath*, 339 U.S. 33.

after opportunity for an agency hearing." The legislative history [of the A.P.A.] makes clear that the word 'statute' was used deliberately so as to make sections 5, 7, and 8 [Sections 545, 556 and 557] applicable only where the Congress has otherwise *specifically* required a hearing to be held." Attorney General's Manual, *supra,* 41; see also A.P.A. Leg. Hist., 79th Cong., pp. 22, 79, 226, 260, 359 (1944–1946). Moreover, the statute must provide not only for a hearing, but that the decision be "on the record." See *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 756–757; *United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224, 236-237 (49 U.S.C. 1(14)(a), authorizing the Interstate Commerce Commission "after hearing * * * [to] establish reasonable rules, regulations, and practices with regard to car service," does not require that such rules "be made on the record"; accordingly, the provisions of Sections 556 and 557 of the A.P.A. are inapplicable to such rule making proceedings[20]). See also 2 Davis, *Administrative Law Treatise,* § 13.08, pp. 225, 229 (1958).

Section 10(k) states only that the Board is "empowered and directed to hear and determine the dispute"; it contains no requirement that the determination be made "on the record."[21] Moreover, the nature

[20] Sections 556 and 557 are applicable only through Section 553 (dealing with rule making) and Section 554 (dealing with adjudications). Section 553(c), like Section 554, makes them applicable only if a statute requires that the determination be made "on the record after opportunity for an agency hearing."

[21] By contrast, Section 9(c)(1), 29 U.S.C. 159(c)(1), states that, if the Board finds that an election petition presents a question of representation affecting commerce, it "shall provide

of the determination is such that neither the Constitution (see n. 19, *supra*) nor general legal principles would import a record requirement into Section 10(k). See *National Labor Relations Board* v. *Radio Engineers Union, Local 1212,* 364 U.S. 573, 583 ("Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board"). This conclusion is reinforced by the fact that the parties are encouraged to adopt, in lieu of a determination under Section 10(k), "methods for the voluntary adjustment of" the dispute, and such methods are likely to be arbitration or other similar informal procedures.

Nor is a different conclusion necessitated by the fact that the Board, by regulation (*supra,* pp. 4–5), has provided for on the record determinations where the Board is required to make a determination under Section 10(k). For, as this Court explained:

> [S]ince any agency is free under the [Administrative Procedure] Act to accord litigants appearing before it more procedural rights than

for an appropriate hearing upon due notice," and, if it "finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and certify the results thereof." Similarly, Section 10(b) and (c), 29 U.S.C. 160(b) and (c), provides for a hearing on an unfair labor practice complaint "before the Board or a member thereof, or before a designated agent or agency," and that, "[i]f upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint" has engaged in the unfair labor practice alleged, "then the Board shall state its findings of fact and shall issue and cause to be served on such person" an appropriate remedial order.

> the Act requires, the fact that an agency may choose to proceed under §§ 556 and 557 does not carry the necessary implication that the agency felt it was required to do so. [*United States* v. *Florida East Coast Railway Co., supra,* 410 U.S. at 236, n. 6.]

Accordingly, even if, contrary to our contention, *supra,* pp. 15–21, a Section 10(k) determination were an "adjudication," it would still not be subject to Section 554 and related provisions of the A.P.A. because the National Labor Relations Act does not require that the determination be made "on the record after opportunity for an agency hearing."

C. TO SUBJECT A SECTION 10(k) PROCEEDING TO THE ADMINISTRATIVE PROCEDURE ACT'S REQUIREMENTS FOR AN "ADJUDICATION" WOULD MAKE THAT PROCEEDING UNNECESSARILY CUMBERSOME AND IMPAIR CONGRESS' OBJECTIVE OF ACHIEVING AN EXPEDITIOUS RESOLUTION OF JURISDICTIONAL DISPUTES

If a Section 10(k) proceeding were deemed to be an adjudication within the meaning of Section 554 of the A.P.A., it would follow that, not only the requirements of that section, but also those of Sections 556 and 557 would be applicable to that proceeding (see n. 9, *supra*). This would mean, *inter alia,* that the employee who presides at the reception of evidence must be a hearing examiner (now Administrative Law Judge, see n. 7, *supra*) appointed under 5 U.S.C. 3105;[22] he must prepare an initial or recommended

[22] This and related sections provide for hearing examiners whose eligibility, promotion, and removal are regulated by the Civil Service Commission. These examiners "shall be assigned cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners."

decision, but only after the parties had an opportunity to file proposed findings and conclusions, together with supporting reasons; and, after issuance of his decision, the parties must be permitted to file exceptions with the agency, together with supporting reasons. Moreover, the record would have to show the ruling upon each finding, conclusion, or exception presented.

These safeguards, which are appropriate for an adversary, trial-type proceeding, which turns largely on credibility determinations would serve no useful purpose in the investigatory, non-adversary Section 10(k) proceeding. On the other hand, to burden a Section 10(k) proceeding with those requirements—*e.g.,* awaiting the availability of an Administrative Law Judge, and precluding the Board from making a determination until he had obtained proposed findings and conclusions and then prepared an initial or recommended decision—would impair Congress' objective of attaining "as expeditious a resolution of the jurisdictional dispute as is reasonably possible." *Bricklayers Union* v. *National Labor Relations Board, supra,* 475 F. 2d at 1321.[23] See also S. Rep. No. 105, 80th Cong., 1st Sess. (Pt. 1) 27, 1 Leg. Hist., 1947, 433.

The delay in resolving the jurisdictional dispute would be compounded by the fact that, as shown (*supra,* pp. 15–21), Section 554 and related provisions

[23] In fiscal year 1973, the median time between filing of an unfair labor practice charge and a Board 10(k) determination was 174 days. (In the present case, it was about 6 months. A. 1.) In the same period, the median time between filing of a charge and a Board unfair labor practice decision in a contested case was 356 days.

of the A.P.A. would be applicable to a Section 10(k) proceeding only on the premise that it resulted in an "order." If it did, then a Section 10(k) determination could be directly reviewed in the court of appeals under Section 10(e) or (f) of the National Labor Relations Act, 29 U.S.C. 160(e) or (f) (contrary to present practice, *supra*, pp. 18–19). This, in turn, would create a potential for double review. A person aggrieved by a Section 10(k) determination could obtain court of appeals review of that determination right after its issuance, and further review, perhaps in another court of appeals, in connection with review of the subsequent Section 8(b)(4)(D) order.[24]

These practical considerations confirm the reasonableness of the Board's conclusion that a Section 10(k) proceeding is not subject to the A.P.A.'s requirements for "adjudication."

D. THE BOARD'S CONCLUSION WITH RESPECT TO THE APPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT TO SECTION 10(k) IS ENTITLED TO GREAT WEIGHT

The Board's conclusion that Section 554 and related sections of the A.P.A. are inapplicable to a Section 10(k) proceeding was, as shown (*supra*, pp. 16–17), "first adopted by the Board as long ago as 1949 in *National Union of Maritime Cooks and Stewards* (*Irwin Lyons Lumber Co.*), *supra*,[25] repeated in 1959 in *Local 8, Longshoremen* (*General Ore, Inc.*), 124 N.L.R.B. 626, and until now * * * not questioned by courts or Congress."[26] *Bricklayers Union* v. *National Labor Relations Board, supra*, 475 F. 2d at 1321. In these circumstances, the Board's view as to the applicability of the A.P.A. to Section 10(k) proceedings is entitled to great weight. *Udall* v. *Tallman*, 380 U.S. 1, 16–17; *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 433–434; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210; see also *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366.

II. THE PARTICIPATION OF THE SECTION 10(k) HEARING OFFICER IN THE SUBSEQUENT SECTION 8(b)(4)(D) PROCEEDING DID NOT IMPAIR THE FAIRNESS OF THE BOARD PROCEEDINGS

If, as we have shown, Section 554 of the A.P.A. is inapplicable to a Section 10(k) proceeding, the combining of hearing officer and prosecutory functions which occurred in this case did not violate the ban on such combination imposed by that section (n. 8, *supra*). Nor does the combination of adjudicatory and prosecutory functions constitute a denial of due process. See *Marcello* v. *Bonds*, 349 U.S. 302;[27] *Fed-*

[24] To avoid this potential for added delay, Congress rejected the provision of the Senate Bill which would have made an arbitrator's 10(k) award directly reviewable in the court of appeals. S. Rep. No. 105, *supra*, at 27, 1 Leg. Hist., at 433; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 57, 1 Leg. Hist. at 561. Cf. the rejection of the proposal for direct review of Board certifications of bargaining representatives, 93 Cong. Rec. 6444, 2 Leg. Hist. at 1542 (Senator Taft).

[25] See also NLRB 14th Annual Report 99 (1949).

[26] Although Congress amended the Act in 1959, and in so doing revised Section 8(b)(4), no suggestion was made for altering the Board's manner of conducting Section 10(k) proceedings.

[27] The Court distinguished *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, relied on by the court below (A. 68, 69–70), on the

eral Trade Commission v. *Cinderella Career and Finishing Schools, Inc.* 404 F. 2d 1308 (C.A.D.C.); *Pangbourn* v. *Civil Aeronautics Board*, 311 F. 2d 349, 356 (C.A. 1); 2 Davis, *Administrative Law Treatise*, § 13.02, pp. 175, 179–180 (1958).

Nor, contrary to the view of the court below, was the Board agent's dual role in the Section 10(k) and Section 8(b)(4)(D) proceedings "incompatible with the accepted norms for the proper administration of justice" (A. 71). The court's view rests on the assumptions that the "hearing officer's rulings at the § 10(k) hearing largely determine what evidence the Board will have to consider at the Unfair Labor Practice Hearing" (A. 69), and the hearing officer's knowledge that "he will subsequently advocate a position based upon his own evidentiary rulings at the § 10(k) hearing could very well influence his decisions at that hearing" (A. 71). The court has misconceived the hearing officer's role in the 10(k) hearing and the relationship of that hearing to the subsequent unfair labor practice proceeding.

To begin with, the Section 10(k) hearing officer is not "the equivalent of a hearing examiner for purposes of § 556" of the A.P.A. (A. 70, n. 3). Rather, he is usually a regional office employee (*supra*, p. 4). The hearing officer's sole function at the Section 10(k) hearing is "to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board" (29 C.F.R. 101.34.[28] "At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, *but makes no recommendations in regard to resolution of the dispute*" (*ibid.*; emphasis added).[29] If the Board rejects the work claim of the union exerting economic pressure and it continues such pressure, an 8(b)(4)(D) unfair labor practice proceeding will ensue. But, contrary to the assumption of the court below, if the individual selected to prosecute the unfair labor practice case is the same person who acted as the hearing officer at the 10(k) stage, there is little likelihood that he will be required to "advocate a position based upon his own evidentiary rulings at the § 10(k) hearing" (A. 71). For the Board's 10(k) "entitlement" determination in the underlying jurisdictional dispute is not subject to relitigation in the 8(b)(4)(D) proceeding (see A. 42, n. 4);[30] the basic issue open to litigation is whether the union has in fact engaged in economic pressure for an object prohibited by Section 8(b)(4)(D)—an issue which was

ground that the A.P.A.'s ban on combining functions had been found to be applicable to the deportation proceeding in that case. Congress' removal of deportation proceedings from that ban was sustained in *Marcello*, *supra*.

[28] The portions of the 10(k) hearing set forth in the Board's supplemental appendix show that the hearing officer adhered to that role here. See, *e.g.*, S.A. 2, 5, 9, 12–13, 17, 24–25.

[29] As in a representation case, the hearing officer's analysis is not served on the parties and does not constitute part of the record; its only purpose is to aid the Board in its own review of the record. See *International Longshoremen's Union*, *supra*, 124 NLRB at 629. Cf. *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 209 F. 2d 782 (C.A. 7).

[30] See also *Chicago Typographical Union No. 16 (Central Typesetting Co.)*, 138 NLRB 231, 236; *Local 3, International Brotherhood of Electrical Workers (Western Electric Co.)*, 144 NLRB 1318, 1319, n. 1.

considered only preliminarily in the 10(k) proceeding (see *supra*, p. 17). Moreover, since the hearing officer has no assurance at the time he is conducting that 10(k) proceeding that he will be assigned to prosecute the subsequent 8(b)(4)(D) case,[21] there is little likelihood that he would be thinking of his future participation in the 8(b)(4)(D) case in making rulings in the 10(k) proceeding.

CONCLUSION

The judgment of the court below should be reversed and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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JULY 1974.

[21] The Regional Director does not ordinarily assign the same person to conduct related 10(k) hearings and 8(b)(4) unfair labor practice cases. See *International Longshoremen's Union*, *supra*, 124 NLRB at 628 ("we think it better practice not to assign a Board agent who has previously engaged in the performance of investigative and prosecuting functions for the Agency to act as a hearing officer in the same or in a related case").

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * * (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * * *

SEC. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be

served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *.

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *:

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner a sin the case of an application by the Boar dunder subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such

charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

The relevant provisions of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended (29 CFR 102.1, and 101.1, *et seq.*) are as follows:

Rules and Regulations

SUBPART F—PROCEDURE TO HEAR AND DETERMINE DISPUTES UNDER SECTION 10(k) OF THE ACT

SEC. 102.89 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) of the act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve upon the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act, he shall give it priority over all other cases in the office except other cases under section 10(l) and cases of like character.

SEC. 102.90 *Notice of filing of charge; notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.*—If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or

have agreed upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of hearing under section 10(k) of the act before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of the filing of said charge. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(l) of the act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in §§ 102.64 to 102.68, inclusive. Upon the close of the hearing, the proceeding shall be transferred to the Board and the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, eight copies thereof shall be filed with the Board at Washington, D.C., within 7 days after the close of the hearing: *Provided, however,* That in cases involving the national defense and so designated in the notice of hearing, no briefs shall be filed, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions: *Provided further,* That, in cases involving the national defense, upon application for leave to file briefs expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may for good cause shown grant such leave and thereupon specify the time for

filing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D.C., 3 days prior to the due date with copies thereof served on the other parties. No reply brief may be filed except upon special leave of the Board.

SEC. 102.91 *Compliance with determination; further proceedings.*—If, after issuance of the determination by the Board, the parties submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4)(D) of section 8(b) and section 10 of the act and the procedure prescribed in §§ 102.9 to 102.51, inclusive, shall, insofar as applicable, govern: *Provided, however,* That if the Board determination is that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

SEC. 102.92 *Review of determination.*—The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the act.

SEC. 102.93 *Alternative procedure.*—If, either before or after service of the notice of

hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b)(4)(D) of the act is occurring or has occurred, he may issue a complaint under § 102.15, and the procedure prescribed in §§ 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and §§ 102.90 to 102.92, inclusive, are inapplicable: *Provided, however,* That if an agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the regional director shall dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

STATEMENTS OF PROCEDURE

SUBPART F—JURISDICTIONAL DISPUTE CASES UNDER SECTION 10(k) OF THE ACT

SEC. 101.31 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).*—The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in § 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the re-

gional director serves on the parties a copy of the charge together with a notice of the filing of such charge.

SEC. 101.32 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*—These matters are handled as described in §§ 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the act are given priority over all other cases in the office except other cases under section 10(l) of the act and cases of like character.

SEC. 101.33 *Initiation of formal action; settlement.*—If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10(k) of the act, he issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(*c*) of the act, or any other satisfatcory method to resolve the dispute. If the agreed-upon method for

voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with that determination.

SEC. 101.34 *Hearing.*—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

SEC. 101.35 *Procedure before the Board.*—The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's

analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

SEC. 101.36 *Compliance with determination; further proceedings.*—After the issuance of determination by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that the parties are complying with the determination, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D) of the act, and the proceeding follows the procedure outlined in sections 101.8 to 101.15, inclusive. However, if the Board determines that employees represented by a charged union are entitled to perform the work in dispute, the regional director dismisses the charge against that union irrespective of whether the employer complies with the determination.

The relevant provisions of the Administrative Procedure Act (5 U.S.C. 551, *et seq.*) are as follows:

§ 551. *Definitions*

For the purpose of this subchapter—

* * * * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * * * *

§ 554. *Adjudications*

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted. When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

* * * * *

§ 556. *Hearing; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision*

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

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